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No. 90-1424

# In the Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,
PETITIONER

*v.*

DEFENDERS OF WILDLIFE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), requires federal agencies to insure, in consultation with the Secretary of the Interior or Secretary of Commerce (as appropriate), that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of an endangered or threatened species. Respondents, three environmental organizations, brought this suit to challenge a regulation jointly issued by the Secretary of the Interior and the Secretary of Commerce that interprets Section 7(a)(2) not to apply to actions in foreign countries. The questions presented are:

1. Whether respondents have standing to challenge the statutory interpretation embodied in the regulation, when they have not challenged any specific action in a foreign country that allegedly violates Section 7(a)(2) and have not shown that the interpretative regulation has caused any injury to their members or that any such injury would be redressed by revision of that regulation.

2. Whether, if respondents have standing, the Secretaries' construction of Section 7(a)(2) of the Endangered Species Act of 1973 as inapplicable to activities in foreign countries is reasonable and consistent with the Act, in light of the presumption against extraterritorial application of Acts of Congress.

## PARTIES TO THE PROCEEDING

The petitioner is Manuel Lujan, Jr., in his official capacity as Secretary of the Interior. The respondent organizations are Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States.

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 911 F.2d 117. The opinion of the district court (Pet. App. 21a-32a) is reported at 707 F. Supp. 1082. Prior opinions of the court of appeals (Pet. App. 33a-54a) and the district court (Pet. App. 55a-64a) are reported at 851 F.2d 1035 and 658 F. Supp. 43, respectively.

### JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. A petition for rehearing was denied on December 10, 1990. Pet. App. 65a. The petition for a writ of certiorari was filed on March 11, 1991, and was granted on May 13, 1991. J.A. 331. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, and 50 C.F.R. 402.01 and 402.02, are set forth at App., *infra*, 1a-13a.

## STATEMENT

This case involves a challenge by three organizations to an administrative interpretation of the geographic scope of Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2). Section 7(a)(2) requires "[e]ach Federal agency * * *, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[1]], to insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."

1. a. The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce, have issued joint regulations interpreting Section 7 and announcing procedures through which they are available to consult with other agencies about actions covered by that Section. 50 C.F.R. Pt. 402 (1990). FWS and NMFS have consistently taken the position that the Secretary's responsibility under Section 7(a)(2) to designate the "critical habitat" of listed species does not apply to habitat in foreign countries. That conclusion

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[1] The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." § 3(15), 16 U.S.C. 1532(15). The Reorganization Plan, 84 Stat. 2090, 5 U.S.C. App. 1349, generally vests responsibility for marine species in the Secretary of Commerce.

was explained in a February 13, 1976, opinion by the Assistant Solicitor of Interior for Fish and Wildlife (J.A. 174-180), and was reflected in the regulations issued by FWS and NMFS in 1978, 43 Fed. Reg. 870, which "adopt[ed] the position that critical habitat may not be determined in foreign countries." 42 Fed. Reg. 4869 (1977).

In his 1976 opinion, the Assistant Solicitor pointed out that Section 7(a)(2) expressly requires the Secretary to consult with "affected States" regarding critical-habitat designations, but makes no mention of foreign governments. He found it "inconceivable" that if Congress had intended the Secretary to make such designations in foreign countries, it would have found input from foreign governments or the Department of State unnecessary or undesirable. J.A. 175. By contrast, he continued, Section 4 of the ESA, 16 U.S.C. 1533, which authorizes the listing of foreign as well as domestic species, expressly provides for notification of and consultation with foreign governments, in cooperation with the Secretary of State (see 16 U.S.C. 1533(b)(1)(A) and (5)(B)), and Section 8, which authorizes the furnishing of financial and other assistance to foreign governments, requires the consent of the foreign governments and the cooperation of the Secretary of State (see 16 U.S.C. 1537). J.A. 175-178. The Assistant Solicitor also concluded that designations of critical habitat in foreign countries would be internationally sensitive, because the United States Government would be imposing on foreign nations its own "environmental policies and ideological orientations," as well as "a sort of land use planning policy." J.A. 178. Finally, he found that it would often be "unworkable and unreasonable" to designate critical habitats abroad, because "nearly insurmountable difficulties arise in obtaining the necessary land descriptions in foreign countries into which access is restricted." J.A. 179.

b. By contrast, FWS and NMFS initially took the position that the requirement in Section 7(a)(2) of the

ESA that federal agencies insure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of an endangered or threatened species (as distinguished from the critical habitat of such a species) *does* apply to actions in foreign countries. That initial position, which also was embodied in the joint regulations issued by FWS and NMFS in 1978 (see 43 Fed. Reg. 874, adding 50 C.F.R. 402.01), was explained in an opinion by the Associate Solicitor for Conservation and Wildlife dated April 12, 1977. J.A. 181-186. She believed that extraterritorial application was indicated because: both foreign and domestic species are listed under Section 4 (J.A. 182); the requirement that agencies insure that actions do not jeopardize protected species applies to "all" federal agencies (J.A. 182); there were general statements in the legislative history to the same effect (J.A. 182-183); and, unlike its provision for designation of critical habitat, Section 7(a)(2) does not require consultation with "affected States" concerning avoidance of jeopardy to listed species (J.A. 186). See also J.A. 164-173.

The Departments of State and Defense, as well as other agencies that fund or carry out activities in foreign countries, strongly objected to this position. They protested that this interpretation was inconsistent with the presumption against extraterritorial application of an Act of Congress; that there was no basis in the text, legislative history or purposes of Section 7(a)(2) for concluding that Congress intended to treat the duty to avoid jeopardy to endangered or threatened species in foreign countries differently from the duty to designate critical habitat of such species (which was (and is) not covered by FWS's and NMFS's interpretation of Section 7(a)(2)); and that overseas application of Section 7(a)(2) would be regarded by foreign governments as an unwarranted interference with matters within their jurisdictions. J.A. 187-191, 198-207, 217-235; 42 Fed. Reg. 4869.

In August 1979, while FWS and NMFS were considering revisions to take account of the 1978 amendments to

the ESA (Pub. L. No. 95-632, 92 Stat. 3751), the Solicitor of Interior ordered a reexamination of the extraterritoriality question. J.A. 208-209. In 1981, the Associate Solicitor for Conservation and Wildlife rendered an opinion concluding that the Interior Department's earlier interpretation had been wrong. J.A. 236-244. In his view, the domestic orientation of Section 7 was established by the text and legislative history of the intervening 1978 amendments to that Section, which permit exemptions from Section 7(a)(2) following a procedure that involves the "affected States," but make no mention of foreign governments. J.A. 239-241; see 7(e)-(*l*), 16 U.S.C. 1536(e)-(*l*). By contrast, in other sections of the ESA that *are* intended to apply in foreign countries, "Congress either expressly required consideration of the programs and policies of the affected foreign nations or mandated the involvement of the Secretary of State." J.A. 241. The Associate Solicitor also reasoned that overseas application of Section 7(a)(2) "would undoubtedly cause significant delays in administering assistance activities in foreign countries," "severely hamper the flexibility and responsiveness of American diplomacy abroad," and compromise the "confidentiality which is often a prerequisite to foreign policy initiatives, intelligence operations or military assistance." J.A. 241-242. In addition, such application would, in his view, implicate "foreign sovereignty considerations," because Section 7(a)(2) "does not establish procedures for considering and deferring to the views of foreign governments with respect to their own development priorities, or plans for fish and wildlife conservation in their own countries." J.A. 242.

This reinterpretation of Section 7(a)(2) was incorporated in joint regulations proposed in 1983 and published as a final rule in 1986. 48 Fed. Reg. 29,990; 51 Fed. Reg. 19,926. As amended, the relevant regulation states that the obligation under Section 7(a)(2) to con-

sult with FWS or NMFS applies only to activities authorized, funded, or carried out by federal agencies in the United States or upon the high seas; activities in foreign countries are not covered. 50 C.F.R. 402.01 (1990); see also 50 C.F.R. 402.02 (defining "action"). The preamble explained that the change was necessary "because of the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." 51 Fed. Reg. 19,929. The preamble also noted that FWS and NMFS perform only an "advisory function under section 7" and that "the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)." *Id.* at 19,928.

2. In October 1986, respondents filed this action against the Secretary of the Interior (but not the Secretary of Commerce), seeking a declaratory judgment that the statutory interpretation expressed in the 1986 regulation is erroneous and an injunction requiring the Secretary to issue a new regulation stating that Section 7(a)(2)'s consultation obligation applies to actions in foreign countries. J.A. 12-21 (first amended complaint). On February 25, 1987, the district court granted the Secretary's motion to dismiss for lack of standing. Pet. App. 55a-64a. The court first rejected respondents' effort to base their standing on allegations concerning their members' generalized interest in observing endangered and threatened species and their resulting interest in proper enforcement and administration of the ESA. See J.A. 13. The court found that theory inconsistent with this Court's decisions. Pet. App. 59a-60a (citing *Allen* v. *Wright*, 468 U.S. 737, 754 (1984), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483-484 (1982)).

Respondents—"[a]pparently realizing the standing deficiencies in their complaint"—had also identified eight projects in foreign countries that allegedly were harming

endangered species. Pet. App. 60a-61a, 63a. Respondents observed that under the interpretation of Section 7 (a)(2) embodied in the 1986 regulation, the agencies concerned would not have a duty to consult with the Secretary about them. *Id.* at 61a. As to the projects remaining relevant to this case—the Mahaweli Project in Sri Lanka (which involves construction of dams and irrigation works on the Mahaweli River and is assisted in part by the Agency for International Development (AID)), and the Aswan High Dam Project on the Nile River in Egypt (which involves rehabilitation of the Dam's power-generating works and is assisted by the Bureau of Reclamation)—respondents contended that they had standing because one member of respondent Defenders of Wildlife (Defenders) had once visited the general location of each of those projects and hoped someday to return.[2]

The district court held that these projects did not "provide a sufficient basis for showing an actual or threat-

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[2] The district court noted that only three of the eight projects respondents identified were "actually being funded or carried out by federal agencies." *Id.* at 61a. The third project the court initially cited—the Picchis-Palcazu forestry project in Peru, which was once assisted by AID (see Pet. App. 63a)—was subsequently held by the court of appeals to be insufficient to confer standing because a member of Defenders "came only within several hundred miles" of the project and therefore could not establish any injury resulting from it. *Id.* at 9a n.2; see Gov't C.A. App. 123, 126. AID's field activity on that project ceased in 1988 due to security conditions in Peru, and AID's participation in it ended altogether in September 1990. Affidavit of James S. Hester (Gov't C.A. Reply Br. Addendum, at 14).

As the district court pointed out, Pet. App. 61a n.6, two other projects identified by respondents had been either halted or completed, and two others were funded by the World Bank, which both courts below held not to be a federal agency for purposes of Section 7. *Id.* at 44a, 61a n.6. The district court found that the last of the eight projects, the Lower Mekong Project, was merely being planned by the Bureau of Reclamation and therefore would not trigger Section 7 in any event. *Id.* at 61a.

ened injury traceable to the Secretary's reinterpretation of Section 7." Pet. App. 62a. It pointed out that "the final decision of whether to proceed or continue with a project lies with the acting agency," not the Secretary; yet respondents had "not sought to enjoin the agency action that they contend is allegedly causing them harm," but instead sought to "have the court construe the ESA in the abstract." *Id.* at 63a. As a result, if the court determined that the Secretary's interpretation of Section 7(a)(2) is erroneous—and if the agencies concerned did not then voluntarily initiate consultation—"[respondents] would have to bring a second lawsuit to enjoin the agency action as it relates to those particular projects." *Id.* at 63a-64a. Thus, the court concluded, respondents "failed to request a remedy that will redress the injury [they are] relying on to show standing." *Id.* at 63a.

3. a. A divided panel of the court of appeals reversed and remanded. Pet. App. 33a-54a. It concluded that respondents had pleaded sufficient injury-in-fact for Article III purposes on either of two theories. *Id.* at 40a-44a. First, the court believed that Defenders had adequately alleged that the projects visited by its members were increasing the rate of extinction of endangered species. *Id.* at 41a-42a. Second, it held that respondents had pleaded a "procedural harm" based on an asserted violation of "procedural rights" under the ESA—namely, respondents' asserted rights, in light of their interest (and that of their members) in the administration of the ESA, to have federal agencies consult with one another about possible injury to a listed species. *Id.* at 42a-44a.

The court of appeals further held that respondents satisfied the additional Article III requirements of showing that the injury they allege "'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Pet. App. 38a (quoting *Valley Forge Christian College*, 454 U.S. at 472, and *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)); see Pet. App. 44a-50a. The court first con-

cluded that Defenders could rely on the proposition, which it found "[i]mplicit" in Defenders' allegation of "procedural injury," that an agency's failure to consult with the Secretary would create a "risk" that the agency might overlook harm to endangered species. *Id.* at 46a.[3]

The court next rejected the Secretary's contention that the traceability and redressability required by *Allen* v. *Wright*, *supra*, and related cases are nevertheless lacking here because: (1) it is "mere speculation" that Section 7 consultation would have made any difference in the design of the projects, since AID had conducted an environmental assessment of two of the three projects and brought about changes that benefited endangered species (see note 22, *infra*); (2) it is up to the agency concerned to decide whether to consult with the Secretary, and the interpretation of Section 7(a)(2) in the Secretary's regulation (or any court-ordered revision thereof) would not require or forbid any action agency to seek advice from FWS or to make any particular decision about a given project; and (3) the final design of a foreign project depends on the independent actions of the foreign government. Pet. App. 47a-50a. The court of appeals dismissed these objections with the observation that this case is "more like" *United States* v. *SCRAP*, 412 U.S. 669 (1973), where standing was found despite a "rather tenuously linked chain of causation," than like *Allen* v. *Wright*. Pet. App. 48a-49a. The court also believed that "Congress itself ha[d] legislated the requisite causation and redressability" by determining that "consultation between the Secretary and the action agency" is the "remedy" for the alleged "harm" to the "personal, professional, and aesthetic interests" of Defenders' members. *Id.* at 49a, 50a.

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[3] Although the court recited the Secretary's submission that there was no indication that the projects respondents identified would actually harm endangered or threatened species, it held that Defenders' standing did not depend on proof of such harm. Pet. App. 46a.

Finally, the court held that respondents were not required to seek injunctive relief against action by federal agencies whose projects in foreign countries allegedly would harm protected species, rather than against the Secretaries' interpretative regulation. Without elaboration, the court stated it was "satisfied" that an injunction requiring the Secretary to revise the regulation "would result in consultation, which in turn would foreclose the possibility that serious harm to an endangered species will be overlooked." Pet. App. 50a.

b. Judge Bowman dissented from what he termed the majority's "slightly surrealistic" holding that respondents have standing. Pet. App. 51a. He found the alleged causal link between the new interpretative regulation and any harm to endangered species in foreign countries "far too speculative, attenuated, and remote to support standing," because the ESA does not give the Secretary of the Interior either "the power to order an action agency to comply with his requests or to veto its decision," or "any power to direct the actions or decisions of a foreign country." *Ibid.* For the same reason, Judge Bowman believed that respondents did not satisfy the redressability requirement for standing, because even if the Secretary were required to revise the regulation, "the action agency and the host nation still would be legally entitled to exercise their independent judgment concerning proposed projects," and it was "entirely speculative" whether the host nation would seek aid elsewhere. *Id.* at 52.

4. On remand, the Secretary moved for summary judgment on the question of standing, after taking the depositions of several members of the respondent organizations who had allegedly suffered injury. Respondents made no attempt to bolster the factual record on standing; they simply moved for summary judgment on the merits. On February 15, 1989, the district court granted respondents' motion. Pet. App. 21a-32a. Although the court acknowledged that respondents must affirmatively prove

their standing at the summary judgment stage, it "fe[lt] that the Eighth Circuit ha[d] already determined the standing question in this case" when it reversed the district court's order granting the Secretary's motion to dismiss, and that "[t]he new 'proof' and arguments offered by the Secretary [did] not vary the situation enough to merit an analysis different from that given by the Eighth Circuit." *Id.* at 24a-25a. On the merits, the district court disagreed with the interpretation in the 1986 regulation and held that the consultation requirement in Section 7(a)(2) applies to activities in foreign countries. Pet. App. 25a-30a. The court therefore ordered the Secretary to publish regulations "clearly recognizing the full mandate" of Section 7 as requiring each federal agency to consult with the Secretary on projects that may affect endangered or threatened species, wherever found. *Id.* at 31a.

5. The court of appeals affirmed. Pet. App. 1a-20a. In holding that Defenders has standing, the court cited affidavits of two of Defenders' members that, in its view, showed that they "had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by" the Mahaweli Project in Sri Lanka and the Aswan High Dam in Egypt. *Id.* at 7a. The court further held that even if none of its members had such a "geographical nexus" to foreign projects that might harm endangered or threatened species, Defenders had satisfied Article III standing requirements by demonstrating a "procedural injury" based on "the Secretary's failure to follow the required consultation procedure." *Id.* at 9a-10a. In the court's view, the "ambitious purpose" of the ESA, and the existence of its citizen-suit provision (§ 11(g), 16 U.S.C. 1540(g)), indicated that Congress "intended to bestow procedural rights upon environmental organizations such as Defenders." Pet. App. 10a-11a.

On the merits, the court of appeals held that Section 7(a)(2) should be construed to apply to activities in

foreign countries. Pet. App. 11a-20a. Although recognizing that statutes are presumed to have only a domestic scope and that this presumption may be overcome only by a "clear expression of congressional intent," *id.* at 13a, 19a, the court believed that a congressional intent to apply Section 7(a)(2) to activities in foreign countries could be "gleaned" from *other* sections of the ESA (Pet. App. 15a): the prefatory declarations in Section 2 that the United States had pledged itself in the international community to conserve various species and had entered into international agreements to that end (16 U.S.C. 1531(a)(4) and (5)); the provision in Section 4 for the Secretary to list species in a foreign country, taking into account the views and conservation efforts of its government (16 U.S.C. 1533(b)(1)(A), (1)(B) and (5)(B)); and the authorization in Section 8, entitled "International cooperation," for furnishing assistance to foreign nations in conserving endangered and threatened species (16 U.S.C. 1537). Pet. App. 13a-15a.[4]

The court of appeals did not dispute the Secretary's representation that overseas application of Section 7(a)(2) would have adverse consequences for the Nation's foreign relations, since it would be regarded "as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species." Pet. App. 20a. But the court concluded that although "Congress may decide that its concern for foreign rela-

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[4] The court rejected the Secretary's contention that it is through Section 8 (as well as Section 9, 16 U.S.C. 1538, which prohibits the taking and importation of, and trade, in listed species)—not through extraterritorial application of Section 7(a)(2)—that Congress addressed the conservation of endangered or threatened species in foreign countries. Pet. App. 14a-15a. The court also believed that when Congress amended the ESA in 1978, it gave "tacit approval" to the initial administrative interpretation that Section 7(a)(2) applies overseas. Pet. App. 17a.

tions outweighs its concern for foreign wildlife," the court would not make such a decision on Congress's behalf. *Ibid.*[5]

## SUMMARY OF ARGUMENT

I. Respondents have failed to show that their members satisfy Article III standing requirements. There is no proof that any members have been injured in their ability to observe endangered or threatened species abroad, that any such injury could fairly be traced to the interpretative regulation respondents challenge, or that the injury is likely to be redressed by a decision in respondents' favor. A member of Defenders of Wildlife once visited the Mahaweli River and Nile River, where the governments of Sri Lanka and Egypt have projects assisted by the United States, and expressed a vague intent to return at some unspecified time in the future. But there was no showing that either project affected the member's ability to observe endangered or threatened species or would be likely to do so in the future, that any such injury could fairly be traced to assistance furnished by the United States or to failure by the responsible federal agency to consult with the Secretary under Section 7(a)(2), or that any injury would be redressed by such consultation or the withholding of U.S. aid.

Moreover, respondents' challenge is directed not to the projects in Sri Lanka and Egypt, but to the administrative interpretation of Section 7(a)(2) in the advisory regulation issued by the Secretaries of the Interior and Commerce. As a result, the elements of causation and redressability are even more attenuated, because action agencies are not bound by that regulation (or any court-ordered revision thereof). In addition, critical decisions

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[5] The Secretary's petition for rehearing, with suggestion of rehearing en banc, was denied on December 10, 1990, with two judges dissenting. Pet. App. 65a. On January 7, 1991, the court of appeals stayed its mandate pending certiorari. J.A. 10.

about projects such as those in Sri Lanka and Egypt are made not by the action agencies, but by the foreign governments concerned. Especially in light of the respect due the independent judgments of a foreign sovereign, respondents have not shown that any impact an overseas project might have on a given species may fairly be traced to assistance rendered by the United States or would be redressed by either consultation about the project within the United States Government or its withholding of further assistance.

There is no merit to the court of appeals' alternative holding that respondents have standing on the theory that they suffered a "procedural injury" as a result of the failure by federal agencies to engage in consultation under Section 7(a)(2). That Section does not purport to confer a right on private parties to have federal agencies consult with one another about a proposed project. In any event, the requirements of injury-in-fact, causation, and redressability stem directly from Article III, and could not be dispensed with by such a statute.

II. The court of appeals' holding on the merits cannot be squared with the established presumption that Acts of Congress do not apply in foreign countries, absent a clearly expressed intention to the contrary. See *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991). Far from exhibiting a clearly expressed intent to apply to actions overseas, the text of Section 7(a)(2) itself, which refers to "affected States" but not foreign nations, has a domestic focus. That focus is confirmed by the ESA's provisions for granting exemptions from Section 7(a)(2), which provide for participation by affected States but not foreign governments. Other Sections of the ESA show that Congress chose cooperation with and the furnishing of aid to foreign governments, as well as the negotiation of agreements—not unilateral imposition of this Nation's environmental standards—to address international aspects of the endangered species problem. Those Sections, as well as the carefully reticulated pro-

visions of Section 9 that prohibit certain overseas (as well as domestic) trade in endangered species, show that when Congress wanted to reach activities in foreign countries, it expressly so provided, and thereby avoided wholesale application of the Act overseas. In addition, the legislative history shows that Section 7(a)(2) was always considered in the context of domestic projects and that Congress understood that the problem of species depletion in other countries would be addressed through international cooperation.

The presumption against extraterritorial application takes on added force in the present context, because of the danger that extraterritorial application of U.S. law will not only clash with foreign law and affront the foreign government concerned, but also interfere with the Executive Branch's conduct of foreign affairs. Moreover, the uniform interpretation by the Secretaries of the Interior and Commerce, and by the Executive Departments and agencies that conduct activities overseas, that Section 7(a)(2) does not apply to actions in foreign countries is at the very least reasonable, and it therefore should be sustained under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

## ARGUMENT

### I. RESPONDENTS LACK STANDING BECAUSE THEY FAILED TO SHOW THAT THEY SUFFERED INJURY-IN-FACT THAT WAS CAUSED BY THE CHALLENGED INTERPRETATIVE REGULATION AND THAT WOULD BE REDRESSED BY REVISION OF THE REGULATION TO STATE THAT SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT APPLIES TO PROJECTS IN FOREIGN COUNTRIES

The courts below considered the geographic reach of Section 7(a)(2) of the Endangered Species Act (ESA) in the context of an abstract dispute over an advisory regulation promulgated by the Secretary of the Interior and Secretary of Commerce to assist other agencies in carrying out their responsibilities under that Section; this exercise in the world of the abstract and hypothetical was far removed from the context of an actual controversy over a specific action in a foreign country to which the obligations of Section 7(a)(2) assertedly attach. To make matters worse, the court of appeals required the Secretary to promulgate a new interpretative regulation incorporating the court's expansive view of Section 7(a)(2), even though respondents were unable to show that the existing regulation had actually affected any particular project in a foreign country—and even though the court was powerless to prevent whatever harm to endangered or threatened species might result from such a project. This is a classic example of an advisory opinion—the forbidden fruit in the Article III garden. *Muskrat* v. *United States*, 219 U.S. 346, 354-358 (1911); Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891).

Article III "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," as well as " 'the proper—and

properly limited—role of the courts in a democratic society.'" *Allen* v. *Wright*, 468 U.S. at 750 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). It confines the jurisdiction of the federal courts to actual "Cases" and "Controversies." Many of the limitations imposed by this bedrock requirement are distilled in the core doctrine of standing. Under that doctrine, a plaintiff first must establish a personal injury-in-fact. The requisite injury cannot be "abstract," "hypothetical," or "conjectural," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); it must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. at 501, or "certainly impending," *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 298 (1979). See *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1723, 1725 (1990). Only a plaintiff who identifies this sort of concrete injury-in-fact has "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. at 498-499 (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). In addition, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723 (quoting *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 38, 41); accord *Renne* v. *Geary*, No. 90-769 (June 17, 1991), slip op. 6; *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 111 S. Ct. 1700, 1704 (1991); *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661, 1667 (1991); *Allen* v. *Wright*, 468 U.S. at 751, 757-759.

Respondents satisfy none of these requirements: they have failed to prove any concrete injury-in-fact, much less one that was caused by the administrative interpretation embodied in the 1986 regulation or that would be

redressed by a court-ordered revision of that interpretation. Nor, contrary to the court of appeals' holding, can respondents avoid satisfying these requirements by relying on a supposed "procedural injury," resulting from their asserted interest in having federal agencies consult with one another about possible harm to endangered species. This Court has repeatedly held that a generalized interest in having the government comply with the law is insufficient to confer standing to challenge government action. As the district court observed in its first opinion in this case, when it dismissed the complaint for lack of standing (Pet. App. 58a): "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy.'" *Valley Forge Christian College*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk R.R.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

### A. Respondents Have Not Proven Their Standing Based On Past Visits By Their Members To The Vicinity Of U.S.-Assisted Projects in Foreign Countries And The Members' Vague Expression Of Intent To Return Sometime In The Future

As this Court has repeatedly held, "[w]e presume that federal courts lack jurisdiction 'unless the contrary appears affirmatively from the record.'" *Renne* v. *Geary*, slip op. 3 (quoting *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986), and *King Bridge Co.* v. *Otoe County*, 120 U.S. 225, 226 (1887)); accord *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 608 (1990) (standing must "affirmatively appear in the record"). Accordingly, respondents had the burden at the summary judgment stage affirmatively to prove their standing to sue. See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186-3189 (1990); see also *Gladstone, Realtors* v.

*Village of Bellwood*, 441 U.S. 91, 115 (1979).[6] Respondents failed to do so.

Respondents brought this case as a facial challenge to an interpretative regulation. The court of appeals permitted that facial challenge to proceed because respondents identified two projects—the Mahaweli Project in Sri Lanka and the Aswan Dam Project in Egypt—that had not been the subject of formal interagency consultation in the past and would not be in the future under the interpretation contained in the regulation. Pet. App. 7a. But respondents' speculation about those projects falls far short of establishing their standing here.

1. As an initial matter, even if the two projects were at issue in this case, respondents would not have standing to challenge them. Under *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), Defenders' standing would depend on proof that at least one of its members had standing. See *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3187. Defenders did not make such a showing.[7]

a. Joyce Kelly, a member of Defenders who visited Egypt in May 1986, simply stated in her affidavit that

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[6] By contrast, when the Secretary moved to dismiss the complaint under Fed. R. Civ. P. 12(b) for lack of standing, the courts below were required to presume that the general allegations in the complaint embraced the specific facts necessary to support respondents' claim. *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3189. This Court's decision in *SCRAP*, on which the court of appeals relied (Pet. App. 42a, 48a-49a), involved a motion to dismiss, not a motion for summary judgment. Accordingly, the *SCRAP* decision, "whose expansive expression of what would suffice for [5 U.S.C.] 702 review under its particular facts has never since been emulated by this Court," is of no relevance here. *Lujan*, 110 S. Ct. at 3189.

[7] The court of appeals found standing based on supposed injury to the two Defenders members. Pet. App. 9a n.2. The court did not hold that the other two respondent organizations had proven injury to any of their members. Those respondents therefore do not have standing under *Hunt*.

she "observed the habitat of the endangered nile crocodile" in Egypt (although she did not claim actually to have seen any crocodiles); that she "intended to do so again" (although she did not say when) and "hope[d] to observe the crocodile directly"; and that in the meantime she "appreciate[d] its existence in the Nile River system." J.A. 100-101. The court of appeals relied on Kelly's vague assertion (J.A. 101) that she would "suffer harm" as a result of the Aswan High Dam Project. Pet. App. 8a. But this is fanciful; Kelly did not state that the project—which, according to the publication Kelly cited, consists solely of rehabilitating the Dam's existing powerplant (see Bureau of Reclamation, *Water for the World* 8 (1986) (J.A. 65))—would have any effect on the continued existence of the Nile crocodile. See J.A. 101.[8] *A fortiori*, Defenders failed to prove that Kelly had suffered or would suffer any injury that could fairly be traced to assistance rendered by the Bureau of Reclamation to rehabilitation of the powerplant or to the Bureau's failure to engage in formal consultation with FWS. Defenders likewise failed to prove that any such harm would be remedied by either formal consultation between the Bureau and FWS or the withholding of any remaining Bureau assistance to the Project.

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[8] The court of appeals recounted that "Kelly stated that she had observed the traditional habitat of the Nile crocodile at the Aswan High Dam project in Egypt." Pet. App. 9a n.2. In fact, Kelly's affidavit avoided any claim that she ever visited the Dam itself, and she did not state that the crocodile actually lives at or near the Dam. J.A. 101. Kelly also stated, without elaboration, that she would suffer harm as a result of assistance rendered by the Bureau of Reclamation to Egypt's Ministry of Irrigation in developing a master water plan. J.A. 101. The Bureau publication *Water for the World* states that the master plan "will serve as a comprehensive guide for developing and managing Egypt's water resources." J.A. 66. It does not suggest that any harm to listed species would result from implementation of the plan.

b. Amy Skilbred, who became a member of Defenders in 1985 (J.A. 144), stated in her affidavit (J.A. 144-146) and deposition (J.A. 309-328) that she traveled to Sri Lanka in 1981-1982 and visited, *inter alia*, the Mahaweli River Valley. J.A. 144-145, 313, 316, 321. However, she did not see any evidence of the Mahaweli Project or even know of its existence at the time (J.A. 316, 327-328)[9] and apparently did not see any endangered or threatened species. J.A. 145, 146, 317. Skilbred also stated that she intended to go back to the Mahaweli Valley "sometime in the future" (J.A. 320-321) and hoped to see the endangered elephant and leopard, although she could not say when, especially in light of the civil war in Sri Lanka. J.A. 144-145, 318, 320-321. Moreover, although Skilbred stated that the Mahaweli Project would reduce the *habitat* of endangered and threatened species (J.A. 145; see also J.A. 325), she did not cite specific evidence that the Project would actually be likely to jeopardize the continued existence of any such species. She stated only that the loss of habitat "may" have that effect. J.A. 145, 317.[10] Nor did Skilbred tie her generalized speculation about the possible impact of the Project to particular species in any discrete area she visited or to the particular portion of the overall Mahaweli Project that was receiving AID funds.[11]

Skilbred likewise did not show (and Defenders did not otherwise prove) that any harm to endangered or threat-

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[9] Skilbred stated in her deposition that she "figured out later"—apparently in 1986—that the Mahaweli River Valley was the site of a project when she read the environmental assessment prepared by AID for the project. J.A. 316. She then knew that "area" was one she had visited. J.A. 327-328.

[10] Those equivocal assertions, even if true, would not establish a violation of Section 7(a)(2), because Section 7(a)(2) requires a federal agency to insure only that any action it authorizes, funds, or carries out is not "likely" to jeopardize the existence of a listed species.

[11] AID has funded construction in only one of the four "systems" into which the Mahaweli Project is divided. J.A. 211.

ened species that might result from the Project could fairly be traced to AID assistance (which amounted to only $170 million of an overall cost of $2.3 billion (J.A. 159)) or to AID's failure to engage in formal consultation with FWS under Section 7(a)(2). In fact, the record shows that even though AID took the position that Section 7(a)(2) did not apply to AID-assisted projects in foreign countries (and that AID therefore declined to engage in formal consultation pursuant to that Section), AID nevertheless funded an environmental assessment of the entire Mahaweli Project pursuant to its own environmental regulations (see 22 C.F.R. Pt. 216; Pet. App. 47a), actively assisted the Government of Sri Lanka in preventing harm to protected species in the Project area, and conferred extensively (albeit informally) with FWS in doing so. J.A. 78-89, 210-216.[12] It there-

[12] In support of its motion to dismiss, the government filed an affidavit of Norman Cohen, the Environmental Coordinator in AID. J.A. 158-160. He explained that AID's involvement with the Mahaweli Project (and the Pichis-Palcazu Project in Peru) "demonstrates that A.I.D. has been and is extremely sensitive to the environmental impacts of its projects, including their effect on endangered species" (J.A. 159). He continued (*ibid.*):

> [The AID-funded environmental] assessment showed that the [Mahaweli] project could affect several endangered species. Accordingly, A.I.D. worked with the Government of Sri Lanka to establish four new nature reserves and associated infrastructure and training programs within the project area. In June 1984, the Administrator of A.I.D. received a letter of appreciation from the World Wildlife Fund for helping to promote environmental protection programs in Sri Lanka such as the Mahaweli nature preserves.
>
> The Pichis-Palcazu forestry project in Peru was designed, in part, to maintain the natural rain forest and its flora and fauna (including endangered species). The Government of Peru had originally proposed opening huge tracts of forest in eastern Peru for colonization and intensive development. Such colonization would have effectively wiped out the habitats of many local species. A.I.D. environmental and project officers conducted an environmental assessment according to A.I.D. environmental regulations and convinced the Peruvians that no further colonists should settle in the valley and redesigned the project ac-

fore is entirely likely that any adverse environmental consequences of the Project would have been *more* severe if AID had not participated. For similar reasons, Defenders failed to prove that any injury to its members would be remedied by further consultation between AID and FWS, or by withholding any remaining AID assistance to the Project.

c. In sum, Defenders utterly failed to show that past failures by action agencies to engage in formal consultation with FWS under Section 7(a)(2) contributed to specific harm to its members' ability to view endangered or threatened species along the Mahaweli or Nile River. Any injury that Kelly or Skilbred might have suffered on their visits to Sri Lanka and Egypt in 1982 and 1986 could not be remedied in this suit in any event, since respondents seek only prospective relief, not damages. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 & n.6 (1983).

In order for Defenders to have standing to seek prospective relief, it would have to prove more than that its members had been injured by the impact of the challenged agency action on their ability to view listed species at some point in the past (even if we assume, arguendo, that Defenders made such a showing); it would have to establish a "real and immediate" threat of further injury. *City of Los Angeles* v. *Lyons*, 461 U.S. at 102-103; *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974); accord *Renne* v. *Geary*, slip op. 7. To do so, Defenders would be required to show, *inter alia*, that its members are currently engaged in on-going visits to the sites where the species in question could be viewed (and where the members therefore would personally suffer the injury that allegedly can be traced to the challenged governmental conduct)[13]—or, perhaps, that such visits will definitely

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cordingly. The assessment included several technical reports on the projects' impact on local flora and fauna that were carefully considered by A.I.D. and the Government of Peru when redesigning the project.

[13] Compare *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3187-3188 (organization's member avers that her "use" and "enjoyment"

occur in the immediate future, so that whatever personal injury might ensue is "certainly impending." *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723, 1725 (quoting *Babbitt* v. *United Farm Workers*, 442 U.S. at 298).

In this case, however, Defenders' two members simply expressed a general desire to return to the areas of the Nile and Mahaweli Rivers at some unspecified time in the future, and an unsubstantiated fear that an absence of consultation between the agencies concerned and FWS in the interim would injure them *if* they returned. That showing would be wholly insufficient even if respondents had sought injunctive relief against the Bureau of Reclamation and AID requiring them to consult with FWS (or withhold assistance from the projects), since standing depends on injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723. If such generalized expressions of intent were alone sufficient, the plaintiff organizations in *Lujan* could have established standing simply by finding members who were willing to represent that they intended, someday, to visit all the millions of acres there at issue. Thus, contrary to the court of appeals' view (Pet. App. 9a n.2), respondents' showing of injury was not stronger —it was weaker and more speculative—than that found inadequate in *Lujan*.

2. Respondents did not, however, even seek relief directed against the particular projects on which they relied to establish injury. They instead sought to require the Secretary to rescind a non-binding regulation interpreting Section 7(a)(2) and to issue a new, equally non-

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of lands "have been and continue to be adversely affected in fact"); *id.* at 3189 (one of organization's members "uses" the land); *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972) (alleged injury will be suffered only by those who "use" the affected areas); cf. *Japan Whaling Ass'n* v. *American Cetacean Society*, 478 U.S. 221, 231 n.4 (1986) (organizations adequately alleged injury-in-fact because the apparently on-going "whale watching and studying of their members will be adversely affected by continued whale harvesting").

binding regulation articulating a broader interpretation. This feature further attenuates the elements of causation and redressability. In the first place, the regulation respondents challenge became effective on July 3, 1986 (see 51 Fed. Reg. 19,926), *after* Kelly and Skilbred visited the Nile and Mahaweli Rivers. Any injury they might have suffered at that time therefore could not fairly be traced to the regulation.

More fundamentally, as FWS and NMFS made clear when they promulgated the 1986 regulation (see page 6, *supra*), action agencies are ultimately responsible for making their own decisions about what is required of them under Section 7(a)(2). See also *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976); cf. *TVA* v. *Hill*, 437 U.S. 153, 186 n.31 (1978). As a result, even if the 1986 interpretative regulation is revised (as the court of appeals ordered), federal agencies would remain free to decide whether to follow Section 7(a)(2)'s standards and procedures in connection with projects in foreign countries. In fact, while the prior regulation interpreting Section 7(a)(2) to apply overseas was still in effect, AID specifically declined to engage in formal consultation with FWS about the Mahaweli Project under Section 7(a)(2). J.A. 79, 80, 214. There is, accordingly, no basis for concluding that reinstatement of that interpretation would cause action agencies to apply Section 7(a)(2) to projects in other countries.[14] Thus, in Administrative Procedure Act terminology, respondents are not "adversely affected" by the particular "agency action" (the interpretative regulation) they challenge. 5 U.S.C. 702; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3185-3186. If respondents ever could show injury in APA and Article III terms, it

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[14] The district court recognized in its initial opinion (Pet. App. 63a-64a) that even if respondents succeeded in changing the interpretation embodied in the regulation, they might have to bring a second suit to challenge particular agency action.

would only be when an agency actually took action. As this Court emphasized in *Lujan*, "[u]nder the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." 110 S. Ct. at 3190.[15]

In addition, the critical decisions regarding projects such as those cited by the court of appeals are not made by the action agencies of the United States Government; to state the obvious, those decisions are made by the respective foreign governments. The Mahaweli Project, for instance, involves twelve donors besides AID, which is furnishing less than 10% of the expected cost. J.A. 159. There could be no assurance that the Government of Sri Lanka would redesign or stop the Project even if AID threatened to terminate funding due to endangered species concerns raised during consultations with FWS. In such situations, host countries may simply turn to other donors that do not place rigid restrictions on their funds.[16]

Thus, the causal connection between the interpretative regulation and the asserted injury to Defenders' mem-

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[15] The Court also reaffirmed in *Lujan* that where, as here, there is no special statute authorizing immediate judicial review of regulations, a challenge to a regulation ordinarily is not ripe "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." 110 S. Ct. at 3190. Here, respondents have not proven any concrete application of the interpretation reflected in the regulation that threatens to harm them. While respondents may prefer to seek "wholesale correction" of what they view as an incorrect interpretation of the law by all departments and agencies in the Executive Branch, a "case-by-case approach * * * is the traditional, and remains the normal, mode of operation of the courts." 110 S. Ct. at 3191; see *Renne* v. *Geary*, slip op. 10; *Allen* v. *Wright*, 468 U.S. at 759-760.

[16] This potentiality is illustrated by the statement of one of Defenders' members, who criticized the environmental effects of a project in Thailand but noted that the Thai Government was committed to going forward with the project and would probably seek money from Japan or Germany if money were not available from existing sources (in that case, the World Bank). J.A. 126.

bers is "highly indirect," hinging as it does on the independent actions of two sets of third parties not before the court. *Whitmore* v. *Arkansas*, 110 S. Ct. at 1725; *Allen* v. *Wright*, 468 U.S. at 757; *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 42; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3190 & n.3. And the prospect of redress is correspondingly speculative. That is especially so because the independent actors here are not mere private parties, but rather agencies of the United States Government and foreign governments "whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.).

Indeed, respondents seek to affect projects on foreign soil undertaken by foreign sovereigns that must be regarded by United States courts as entirely proper under those sovereigns' own laws. See *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 110 S. Ct. 701, 704-705 (1990); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Proper respect for the independent judgment of foreign sovereigns requires that a United States court not undertake to determine whether decisions by a United States agency regarding assistance rendered to a project implemented by a foreign government within its own territory are sufficiently likely to lead to a particular response by that government to satisfy the causation and redressability minima for Article III standing. See *Cardenas* v. *Smith*, 733 F.2d 909, 914 (D.C. Cir. 1984); *Greater Tampa Chamber of Commerce* v. *Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980). That conclusion is compelled by the principle of separation of powers that underlies Article III standing doctrine (see *Allen* v. *Wright*, 468 U.S. at 751-752, 759-760), because the Constitution commits the power over foreign affairs to the political Branches, not Article III courts; and it specifically commits to the Executive Branch the prediction and assessment of reactions by foreign governments to actions of the United States Government, as part of the diplomatic

process and the broader role of the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).[17]

The court of appeals erred in nevertheless finding standing on the rationale that Congress could simply "legislate[] the requisite causation and redressability" and had done so here by "determin[ing] that the remedy for the harm to the[] members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency." Pet. App. 49a-50a. There is no basis in the ESA for respondents' self-centered vision of Section 7(a)(2): that provision was designed to prevent harm to certain species of plants and animals, not to "remedy" injuries to the "interests" of [illegible] beings or the organizations to which they belo[illegible] novel theory advanced by respondents and the court of appeals therefore fails as a statutory matter. But in addition, the requirements of causation and redressability stem directly from Article III, *Whitmore* v. *Arkansas*, 110 S. Ct. at 1722-1723 & n.1; *Valley Forge Christian College*, 454 U.S. at 472, and thus cannot be waived by Congress. See *Warth* v. *Seldin*, 422 U.S. at 501. The ESA citizen-suit provision, 16 U.S.C. 1540(g), upon which the court of appeals relied (Pet. App. 10a), likewise cannot overcome standing deficiencies under Article III. See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assoc.*, 453 U.S. 1, 16 (1981) ("citizen-suit provisions apply only to persons who can claim some sort of injury"); see also *Gwaltney of Smith-*

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[17] The need for circumspection in recognizing standing in this case is especially clear because respondents' claim of "injury" rests on alleged harm to wildlife within the territorial jurisdiction of foreign sovereigns. At least in the absence of the clearest expression of congressional intent, an asserted "injury" arising in such a wholly foreign context should not be a basis for invoking the jurisdiction of a United States court under United States law. Cf. *Mason* v. *United States*, 260 U.S. 545, 558 (1923); *Ellenwood* v. *Marietta Chair Co.*, 158 U.S. 105, 107 (1895).

*field, Ltd.* v. *Chesapeake Bay Foundation*, 484 U.S. 49, 65-66 (1987).[18]

### B. The Court of Appeals Erred By Resting Standing On An Alleged "Procedural Injury"

The court of appeals tried to sidestep respondents' failure to prove the concrete injury-in-fact, causation, and redressability required by Article III by holding that respondents' standing could rest on a "procedural injury" that supposedly arises from the failure by action agencies to engage in Section 7 consultation about overseas projects. Pet. App. 10a-11a, 42a-44a. Even under this novel theory, respondents would lack standing, because they have not sued an action agency to compel it to consult with the Secretary; to the contrary, they have sued a defendant who is not authorized by the ESA to require other agencies to consult. In any event, there is no indication that the consultation provisions of Section 7 were intended to confer procedural rights on private groups such as respondents. Consultation takes place entirely between the relevant agencies, without any statutory provision for public input. See 16 U.S.C. 1536(b)

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[18] In any event, the citizen-suit provision, as relevant here, authorizes suits only against a person "who is alleged to be in violation" of the ESA. 16 U.S.C. 1540(g)(1)(A). Section 7(a)(2) imposes the duties to consult and refrain from jeopardizing listed species directly on the action agency. If it fails to consult, it is that agency, not the Secretary, that has "violated" the ESA. Nor is the Secretary "in violation" of the ESA because he allegedly has given an incorrect interpretation to one of its provisions, especially since the ESA did not require the Secretary to issue a regulation interpreting the geographic scope of Section 7(a)(2) in the first place. Although the citizen-suit section does permit suits against the Secretary in certain limited circumstances, this is not one of them. See 16 U.S.C. 1540(g)(1)(B) and (C) (suits to compel the Secretary to apply certain prohibitions on takings, and suits alleging a failure by the Secretary to perform any non-discretionary act or duty under Section 4, which pertains to the listing of species and designation of critical habitat). This suit therefore is one challenging "agency action" (the regulation) under the general judicial review provisions of the APA.

and (c); 51 Fed. Reg. at 19,928.[19] Section 7 therefore is unlike the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, which often serves a public-information purpose. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989).

Moreover, even under a statute like NEPA, some concrete stake, distinct from a "procedural" claim, is essential for Article III standing, because procedural protections exist only to secure substantive interests and therefore may be invoked only by persons who suffer injury to those interests. Accordingly, the three circuits that have recognized "procedural injury" as a basis for standing in suits arising under NEPA have limited that theory to a litigant "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have." *City of Los Angeles* v. *NHTSA*, 912 F.2d 478, 492-493 (D.C. Cir. 1990) (quoting *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); see also *Friends of the Earth* v. *U.S. Navy*, 841 F.2d 927, 931-932 (9th Cir. 1988); *City of Evanston* v. *Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *South East Lake View Neighbors* v. *Dep't of Housing & Urban Development*, 685 F.2d 1027, 1039 (7th Cir. 1982). The Eighth Circuit's rejection of the "geographical nexus" requirement in this case (see Pet. App. 10a-11a) therefore departs both from basic standing principles and established precedent.

Respondents' asserted right to have government agencies consult with one another is indistinguishable from the "asserted right to have the Government act in accordance

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[19] FWS and NMFS rejected requests to provide an opportunity for public comment in the initial regulations governing interagency consultation promulgated in 1978. They explained that a public comment requirement would be administratively burdensome, since they expected to receive between 10,000 and 20,000 consultation requests per year, and also that "Federal agencies may avoid the consultation process if they are given the impression that they are going to be subjected to protracted political battles under the guise of public comment and participation." 43 Fed. Reg. 872.

with law" found insufficient in *Allen* v. *Wright*, 468 U.S. at 754. The mere fact that respondents may have exhibited a long-standing organizational interest in the implementation of Section 7(a)(2) likewise is not enough to confer standing, contrary to the court of appeals' view, Pet. App. 10a, 43a. See *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). As this case vividly illustrates, the court of appeals' novel standing theories open the way for broad suits by organizations that have no concrete stake in the conduct of governmental programs, contrary to *Lujan* v. *National Wildlife Fed'n*, *supra*.

For the foregoing reasons, the Court should reverse the judgment below and remand with directions to enter judgment for the Secretary on standing grounds, because respondents did not raise a genuine issue of material fact to support their allegations of standing. Compare *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3186-3187, 3188-3189.

## II. THE 1986 REGULATION IS BASED ON A PROPER INTERPRETATION OF SECTION 7(a)(2) AS NOT APPLYING TO ACTIONS IN FOREIGN COUNTRIES

In addition to the abstract nature of respondents' challenge, the decision of the court below will, if it stands, have far-reaching consequences. An agency's duty to consult with the Secretary under Section 7(a)(2), on which the court of appeals focused, is ancillary to (and in aid of) the agency's substantive duty to insure that actions it authorizes, funds, or carries out are not likely to jeopardize the continued existence of endangered or threatened species. If the duty to consult applies to activities in foreign countries, then so does the duty to avoid jeopardy. The latter is one of the strictest standards under the Nation's environmental laws. See *TVA* v. *Hill*, 437 U.S. 153, 172-174 (1978).

Even the consultation obligation would impose significant burdens and anomalies in this setting.[20] The elab-

[20] The action agency first must obtain from FWS or NMFS information about whether a listed species may be present in the

orate procedures contemplated by the consultation process (see note 20, *supra*) are designed to ensure that all relevant information and alternative courses of action are fully scrutinized by and debated among agencies of the United States Government. They are premised on full access to relevant information; they reflect domestic environmental values and commitments to a deliberative process; and they are suited to evaluating and rendering decisions about governmental actions, species of animals and plants, and territory that are fully within the jurisdiction of the United States as sovereign.

By contrast, these structured deliberations—which are wholly internal to the United States Government and focus on whether a project would comply with a strict standard derived solely from United States law—are not tailored to making judgments about projects to be undertaken within a foreign country, where the territory, project, natural resources, and species affected are all within the primary jurisdiction of the foreign government and its laws. Not only would this procedure likely cause affront to the foreign government concerned, but the agencies of the United States Govern-

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action area: if so, and if the project is a "major construction activit[y]," the agency must prepare a "biological assessment" within 180 days. 16 U.S.C. 1536(c); 50 C.F.R. 402.12. If the assessment shows a likely adverse effect on a listed species, then formal consultation, resulting in a formal "biological opinion" by FWS or NMFS, must occur over a 90-day period. 16 U.S.C. 1536(b); 50 C.F.R. 402.12(k), 402.14(b) and (e). During that time, the agency must refrain from making an irreversible commitment of resources that would foreclose reasonable alternatives. 16 U.S.C. 1536(d); 50 C.F.R. 402.09. If FWS or NMFS finds that the action is likely to jeopardize the existence of a listed species, it must identify what "reasonable and prudent alternatives" (if any) the agency can take to avoid a violation of Section 7(a)(2). 16 U.S.C. 1536(b)(3)(A) and (4); 50 C.F.R. 402.14(g)(5) and (h). The agency then must decide "whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion." 50 C.F.R. 402.15(a). It may disagree with that opinion, adopt an alternative course to avoid jeopardy, or seek an exemption (which can itself be a time-consuming process, see 16 U.S.C. 1536(g); 50 C.F.R. Pts. 450-453).

ment involved in the consultation process might well lack access to all relevant information concerning conditions in the foreign country; what is more, the prescribed procedures would often be incompatible with the need for speed, flexibility, confidentiality and comity in the conduct of this Nation's foreign affairs. An Act of Congress should not lightly be construed to extend such rigid substantive standards and ill-suited procedures to activities abroad. Cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. Ct. 1056, 1065-1066 (1990).

For reasons such as these, "[i]t is a long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Congress is presumed to be "primarily concerned with domestic conditions," unless an "affirmative intention" to give the relevant statutory provision extraterritorial reach is "clearly expressed." *Arabian American Oil Co.*, 111 S. Ct. at 1230 (quoting *Foley Bros.*, 336 U.S. at 285, and *Benz* v. *Compania Naviera Hildalgo, S.A.*, 353 U.S. 138, 147 (1957)). This rule "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Arabian American Oil Co.*, 111 S. Ct. at 1230. The Court assumes that Congress acts against the backdrop of this presumption, *ibid.*, and the requirement in this "traditionally sensitive area[]" that there be a "clear statement"—*i.e.*, that "Congress must state precisely any intention" to give extraterritorial application to a statutory provision—"assures that the legislature has in fact faced" and is prepared to accept the potential consequences. See *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, No. 89-1895 (June 10, 1991), slip op. 4.[21]

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[21] In *Arabian American Oil Co.*, the Court distinguished *Steele* v. *Bulova Watch Co.*, 344 U.S. 280 (1952), which sustained application

In this case, the court of appeals rejected the uniform and considered interpretation of Section 7(a)(2) by the Secretaries of the Interior and Commerce, who are responsible for its administration—and by the other departments and agencies in the Executive Branch that are responsible for national defense, foreign relations, and overseas aid—that Section 7(a)(2) does *not* apply to projects in foreign countries. But in doing so, the court of appeals did not point to any affirmative indication—much less a "clear statement"—that Congress specifically intended that Section to apply overseas. In fact, where Congress intended a particular section of the ESA to have extraterritorial application, it expressly so stated and provided for coordination with the foreign government concerned or the Secretary of State. By contrast, the text and legislative history of Section 7 establish that it has a "purely domestic focus." *Arabian American Oil Co.*, 111 S. Ct. at 1234.[22] At the very least, the admin-

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of the Lanham Act's prohibition against deceptive and misleading use of trademarks to acts consummated in Mexico; the Court noted that the conduct in *Steele* had "some effects within the United States" and that the Lanham Act had a "broad jurisdictional grant" and a "sweeping reach into 'all commerce which may lawfully be regulated by Congress.'" 111 S. Ct. at 1232 (quoting 344 U.S. at 285, 287). The antitrust and securities laws likewise apply to conduct outside the United States but having an effect within. See *W.S. Kirkpatrick & Co.*, 110 S. Ct. 701, 705-706 (1990); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *Consolidated Gold Fields PLC* v. *Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, on reh'g on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969); see also *Restatement (Third) of Foreign Relations Law* § 416 (1986). Section 7(a)(2) of the ESA (like Title VII) is quite different, and there is no indication that Congress intended it to apply in foreign countries because of any effects within the United States.

[22] Other courts of appeals, in contrast to the court below, have relied on the presumption in ruling against extraterritorial application of the Nation's environmental statutes. See *NRDC* v. *NRC*,

istrative interpretation of Section 7(a)(2) to that effect is reasonable and therefore should have been sustained under *Chevron*.

### A. The Text of the Endangered Species Act Establishes That Section 7(a)(2) Is Not To Be Construed To Apply To Activities in Foreign Countries

1. The text of Section 7, far from demonstrating a "clearly expressed" intention that it apply to overseas activities, is focused on domestic concerns. It requires federal agencies to "insure" that actions they authorize, fund, or carry out are "not likely to jeopardize the continued existence of any endangered species or threatened species, or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." The court of appeals recognized (Pet. App. 12a-13a) that the mere use of such general phrases as "any action" in Section 7(a)(2) is insufficient to extend its coverage to actions in foreign countries, in light of the presumption against extraterritorial application.[23] See *Foley Bros.*, 336 U.S. at 282 (statute requir-

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647 F.2d 1345, 1356-1357 (D.C. Cir. 1981) (holding NEPA inapplicable to the export of a nuclear reactor to the Philippines); *United States* v. *Mitchell*, 553 F.2d 996, 1003-1004 (5th Cir. 1977) (holding the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*, inapplicable within the territorial waters of the Bahamas); see also *Greenpeace USA* v. *Stone*, 748 F. Supp. 749, 758-759 (D. Haw. 1990) (rejecting NEPA challenge to the Secretary of Defense's implementation of an agreement with the Federal Republic of Germany to remove obsolete chemical weapons from Germany), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

[23] The extraterritoriality question in this case hinges on the meaning of the phrase "any action" in Section 7(a)(2). The regulation at issue interprets that phrase to encompass only agency actions "in the United States or upon the high seas," but recognizes that the requirements of Section 7(a)(2) apply wherever such actions would affect "any listed species." 50 C.F.R. 402.01. Section 4 of the ESA specifically contemplates the listing of foreign as well as domestic species, in order to implement importation and foreign commerce restrictions under Section 9 and international cooperation under Section 8. Thus, the regulation indicates that Section 7(a)(2)

ing eight-hour day provision in "[e]very contract made to which the United States is a party" inapplicable to contracts for work performed in foreign country); see also *Arabian American Oil Co.*, 111 S. Ct. at 1231-1232 (broad definitions of "employer" and "commerce" insufficient to sustain extraterritorial application of Title VII).

Significantly, moreover, the only geographical reference in Section 7(a)(2) is to "affected States." The absence of any reference to foreign nations strongly indicates that Congress, as usual, was focusing on domestic activities. See *Arabian American Oil Co.*, 111 S. Ct. at 1234 (similarly noting Title VII's mention of "states" but not foreign nations).[24] In fact, the court of appeals did not question the longstanding position of the Secretaries of the Interior and Commerce that the portion of Section 7(a)(2) in which the reference to "affected States" appears does *not* contemplate designation of critical habitat in foreign countries. See pages 2-3, *supra*.

The court of appeals' response—that Congress intended extraterritorial application of Section 7(a)(2)'s protection for species but not its intimately related protection for their critical habitat (Pet. App. 18a)—is manifestly unsound. Even in the ordinary case it would be surprising to conclude that Congress intended, without say-

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might well apply if an action in the United States or on the high seas would be likely to jeopardize the continued existence of an endangered or threatened species in a foreign country. Nothing, however, suggests that Section 7(a)(2) was intended to apply where the action itself is in a foreign country.

[24] Moreover, the text of Section 7(a)(2) requires agencies to "insure" that actions they authorize, fund, or carry out will not have the specified impacts on listed species or their habitats. Federal agencies are in a position to "insure" that result within the territorial jurisdiction of the United States (where state and local governments and private parties whose actions are "authorized" or "funded" by federal agencies remain subject to federal law, and to the jurisdiction of the courts where necessary to enforce the law)—and perhaps even on the high seas. But the ability of an agency of the United States to "insure" compliance would be greatly circumscribed in a foreign country, in view of the foreign government's independent prerogatives.

ing so, to give vastly different geographic scope to two phrases in the same sentence of a statute. But it is hardly the ordinary case where a court gives *extra-territorial* effect to one phrase, while giving the usual domestic effect to the other. The court below should not have adopted such a bizarre construction without clear evidence that Congress actually considered the extraterritoriality issue in the context of Section 7(a)(2) and deliberately chose that solution. Not surprisingly, there is no such evidence here. Indeed, it would be particularly illogical to give divergent scopes to the duty to avoid jeopardy to listed species and the duty to avoid destruction or adverse modification of their critical habitat, since Congress recognized that the "most significant" threat to the continued existence of species was "the destruction of critical habitat." H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973); see also *TVA* v. *Hill*, 437 U.S. at 179 ("destruction of natural habitats" is greatest threat to endangered species).[25]

2. The domestic focus of Section 7 as a whole is confirmed by the exemption provisions in subsections 7(e)-(p), 16 U.S.C. 1536(e)-(p).[26] Exemptions may be

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[25] In addition, the reference to "States" in the second part of the relevant sentence of Section 7(a)(2) cannot readily be separated as a grammatical matter from the duty described in the first part to avoid jeopardy to "endangered or threatened species." The second part of the sentence requires agencies to insure that their actions are not likely to destroy or adversely modify the habitat of "such species" that has been determined by the Secretary, after consultation with "affected States," to be critical. The reference to "such species" obviously is to the endangered or threatened species mentioned in the first part of the sentence. There accordingly is a direct nexus between the second part of the sentence (including its reference to "States") and the duty to avoid jeopardy to listed species, which respondents seek to extend to foreign countries.

[26] The exemption provisions were added in 1978 in response to the strict application of Section 7 to a domestic dam project in *TVA* v. *Hill*, *supra* (H.R. Rep. No. 1625, 95th Cong., 2d Sess. 10-11, 13 (1978)), and they caused the Interior Department promptly to reconsider and then to change its initial view that Section 7 applies to projects in foreign countries.

granted by an Endangered Species Committee consisting of the heads of six federal agencies and "one individual from each affected State." 16 U.S.C. 1536(e)(3).[27] Similarly, the entities that may apply for an exemption are limited to the action agency, a permit or license applicant, and "the Governor of the State in which an agency action will occur, if any." 16 U.S.C. 1536(g)(1).[28] No role is provided for a representative of a foreign government, or for the Secretary of State, in the process of granting exemptions from Section 7(a)(2)'s rigid requirements. Compare § 7(i) (barring exemption where Secretary of State certifies it would violate treaty or other international obligation of the United States).

Moreover, to grant an exemption, the Committee must find that "the action is of regional or national significance," there are no "reasonable and prudent alternatives," the benefits "clearly outweigh the benefits of alternative courses of action," and the action "is in the public interest." 16 U.S.C. 1536(h)(1)(A). In devising these tests, Congress plainly had domestic projects in mind. Indeed, it would significantly intrude upon the sovereignty of foreign nations for the United

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[27] The House Report on the 1978 amendments noted that membership on the committee "has been deliberately structured * * * to balance all possible points of view." H.R. Rep. No. 1625, *supra*, at 15. If Congress had intended Section 7 to apply to activities within foreign nations, membership of the Secretary of State would be necessary to "balance all possible points of view."

[28] Contrary to the court of appeals' speculation (Pet. App. 19a), the reference to the affected State "if any" does not suggest that activities in foreign countries are covered. That phrase assumes coverage of activities on the Outer Continental Shelf, which lies outside the boundaries of the States (see 43 U.S.C. 1312; *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 547 (1987)), and on the high seas, in light of the responsibilities of the Secretary of Commerce for marine species. 16 U.S.C. 1532(15), 1536(e)(3)(F); 124 Cong. Rec. 21,563-21,564 (1978). Coverage of activities in those areas does not present the same degree of foreign-relations sensitivity that would arise from coverage of activities within the territories of foreign sovereigns. Cf. *Arabian American Oil Co.*, 111 S. Ct. at 1233.

States Government to presume to pass judgment—outside the diplomatic process, in a formal and public manner, and under standards and procedures prescribed by United States law—on whether their projects are in the "public interest" and whether alternative courses of action are "reasonable and prudent" and might be preferable.

3. The court of appeals ultimately relied on *other* sections of the ESA in holding that Section 7(a)(2) applies to activities in foreign countries. Pet. App. 13a-15a. But the provisions upon which the court relied in fact confirm that Congress distinguished between the endangered species situation in the United States and that in foreign countries, and dealt with the latter by the accepted means of encouraging cooperative efforts between nations, rather than imposing this Nation's environmental standards abroad.

The congressional findings in paragraphs (1)-(3) of ESA Section 2(a) focus on species of fish, wildlife and plants "in the United States" that have been rendered extinct or depleted "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1)-(3). There is no similar finding with regard to the effect of development in foreign nations, presumably because they may have different views about the proper balance between economic growth and environmental protection. Paragraph (4) notes that the United States "has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction," pursuant to treaties and international agreements. 16 U.S.C. 1531(a)(4). Thus, in the international sphere, Congress contemplated that measures would be taken cooperatively among "sovereign state[s]," each having jurisdiction within its own territory, and that conservation accordingly would be accomplished only "to the extent practicable." 16 U.S.C. 1531(a)(4). Section 7(a)(2) is not tempered by such considerations of practicability and respect for national sovereignty.

Reflecting the approach envisaged by Section 2 of the ESA, Section 8, entitled "International cooperation," addresses conservation of species abroad by authorizing the President "to provide to any foreign country (with its consent) assistance in the development and management of programs * * * useful for the conservation of any endangered species or threatened species listed by the Secretary." 16 U.S.C. 1537(a). Section 8 further provides that the Secretary of the Interior, "through the Secretary of State," shall "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. 16 U.S.C. 1537(b).

Congress also dealt with the protection of foreign species in Section 9 of the ESA, which makes it unlawful, *inter alia*, to "deliver, receive, carry, transport, or ship in interstate or foreign commerce" any endangered species. 16 U.S.C. 1538(a)(1)(E) and (a)(2)(C). "Foreign commerce" is defined in Section 3 of the ESA to include, *inter alia*, any transaction "between persons within one foreign country." 16 U.S.C. 1532(9)(A). Thus, Section 9's prohibition on commerce in endangered species is explicitly extraterritorial. At the same time, it is carefully tailored to apply only to persons "subject to the jurisdiction of the United States," 16 U.S.C. 1538 (a)(1) and (2). The related prohibition on "takings" of endangered fish or wildlife is limited to the United States, its territorial sea and the high seas. 16 U.S.C. 1538(a)(1)(B) and (C). This carefully reticulated structure of Section 9 shows that Congress clearly specified when it wanted to reach acts committed beyond the boundaries of the United States, and carefully avoided any wholesale application of the Act's provisions to activities in foreign nations. In this context, the absence of any explicit statement in Section 7 extending its standards and procedures to actions in foreign countries confirms that Congress acted in accordance with the operative presumption and did not give that Section extraterritorial application. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. at 441.

Of course, because the Act has both domestic and international components, it was necessary to provide for the listing of both domestic and foreign species. But in doing so, Section 4, like Sections 8 and 9, is carefully tailored to accommodate the divergent interests and sensitivities of foreign nations by requiring the Secretary to take account of their efforts to protect species, 16 U.S.C. 1533(b)(1)(A), and to afford notice and an opportunity to comment to the foreign nation affected, 16 U.S.C. 1533(b)(5)(B).[29] Section 7, by contrast, does not mention foreign nations and contains no provisions to consider and accommodate their interests and views. This reinforces the conclusion, already evident from the references in Section 7(a)(2) itself to "affected States," that Congress did not intend *that* Section of the Act to apply overseas.

4. It is not surprising that Congress chose to address the problem of endangered species in other countries by means of international cooperation instead of mandatory application of Section 7's strict no-jeopardy standard. There has long been a consensus among nations that the development or protection of natural resources within each nation's boundaries is primarily the responsibility of that nation.[30] Accordingly, international conven-

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[29] In fact, even before Section 7 was enacted as part of the ESA of 1973, the Secretary of the Interior was required by Section 3(a) of the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed, 87 Stat. 903), to list species of fish or wildlife "threatened with worldwide extinction." That provision instructed the Secretary to make such a listing "after consultation, in cooperation with the Secretary of State, with the foreign country or countries in which such fish or wildlife are normally found." The 1969 Act generally prohibited importation of listed species (§ 2, 83 Stat. 275), but contained no provisions directed to federal agencies.

[30] Principle 21 of the Declaration of the United Nations Conference on the Human Environment, agreed upon in Stockholm in 1972, declares:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that

tions dealing with wildlife confirm the authority and responsibility of each state to protect its resident wildlife. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), for instance, recognizes in its preamble "that peoples and States are and should be the best protectors of their own wild fauna and flora." 27 U.S.T. 1087, T.I.A.S. No. 8249.[31] See also Convention on the Conservation of Migratory Species of Wild Animals, 1979 (Bonn Convention), Preamble, 19 I.L.M. 15 (1980) ("the States are and must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries"). Moreover, other nations have taken steps to assume responsibility for their natural resources and for implementing their own judgments regarding the appropriate balance between development and protection.[32]

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activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

U.N. Doc. A/Conf. 48/14, 11 I.L.M. 1416, 1420 (1972). The Stockholm Declaration also recognizes that "standards which are valid for the most advanced countries * * * may be inappropriate and of unwarranted social cost for the developing countries," and that "[c]o-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects * * * in such a way that due account is taken of the sovereignty and interests of all States." *Id.* at 1420-1421 (Principles 23 & 24). See also *Restatement (Third) of Foreign Relations Law* § 206(a) (1986) (a state has "sovereignty over its territory").

[31] In the international sphere, the primary purpose of the ESA was to implement the recently concluded CITES convention. See S. Rep. No. 307, 93d Cong., 1st Sess. 5-6 (1973); H.R. Rep. No. 412, 93d Cong., 1st Sess. 2-3 (1973). Significantly, CITES requires parties to enact and enforce prohibitions against wildlife trade in violation of the Convention (a requirement implemented by Section 9(c) of the ESA, 16 U.S.C. 1538(c)), but does not require them to limit governmental activities, either at home or abroad, that could result in jeopardy to endangered species. See Art. VIII.

[32] For example, in a May 1980 letter to AID about the Mahaweli Project, FWS observed that "[t]he Sri Lankan government realizes

For these reasons, many nations would find it offensive to have standards derived from American statutes applied to projects within their boundaries, and foreign government sensitivity in turn could impede initiatives to enhance environmental protection. Cf. *Japan Whaling Ass'n*, 478 U.S. at 222, 241. It would thus be surprising if Congress had chosen to apply the strict standard of Section 7(a)(2) to activities in foreign nations. The statutory text shows clearly that it did not.

### B. The Legislative History of Section 7 Confirms its Domestic Orientation

References to Section 7 in the legislative history of the 1973 Act mention only domestic agency actions as being affected. See, *e.g.*, H.R. Rep. No. 412, *supra*, at 14 (Park Service actions in Yellowstone Park); 119 Cong. Rec. 42,913 (1973) (Air Force practice bombing in Texas); *id.* at 25,689-25,690 (Corps of Engineers road-building in Kentucky). By contrast, both the House and Senate Reports discuss the problem of endangered species abroad in terms of international cooperation under Section 8, without mentioning the requirements of Section 7. S. Rep. No. 307, 93d Cong., 1st Sess. 5-6 (1973) (citing need for international cooperation to fulfill treaty commitments); H.R. Rep. No. 412, 93d Cong., 1st Sess.

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the importance of the wildlife as part of their national heritage" and "has a good wildlife parks system and a functional Department of Wildlife Conservation"; its fauna and flora are "well-studied"; and "competent personnel" are present in the country. J.A. 215-216. There is, in fact, a long history of nations' taking protective measures with respect to wildlife and the environment within their jurisdictions. King Akhenaten set aside land as a nature reserve in 1370 B.C., and Emperor Ashoka of India issued a decree in the third century B.C. that protected various birds, bats, queen ants, terrapins, boneless fish, rhinoceroses and "all quadrupeds which are not useful or edible." S. Lyster, *International Wildlife Law* xxi (1985). More recently, many nations have enacted into law some form of environmental-analysis requirement. See *Analysis and Perspective: Environmental Impact Assessment in North America, Western Europe: What Has Worked Where, How, and Why*, 11 Int'l Env't Rep. (BNA) 257 (1988).

6 (1973) (Act deals with endangered species abroad by encouraging other countries' efforts to protect species and by closing American markets to trade in species). Senator Tunney, the floor manager, similarly stated (119 Cong. Rec. 25,670 (1973)):

> [W]hile we are concerned with our endangered domestic species, we must not forget the many animals that are in need of worldwide attention. S. 1983 includes the mechanisms of international cooperation that fulfill our commitments under international conventions for the protection of endangered species.[33]

The legislative history of the 1978 amendments is to the same effect. The Senate Report, for example, explained that the exemption procedure was "intended to provide a mechanism for the resolution of conflicts which might arise between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate *national* goals and priorities such as providing energy, economic development and other benefits to the *American* people." S. Rep. No. 874, 95th Cong., 2d Sess. 2 (1978) (emphasis added); cf. *Benz*, 353 U.S. at 144, and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963) (both quoting legislative history of intent to protect "*American* workingmen"). The floor debates on the exemption procedure likewise discuss Section 7 only in connection with projects in the United States.[34]

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[33] See also 119 Cong. Rec. at 25,676 (Senator Williams) (foreign species addressed by encouraging other nations to adopt their own protection programs and through multilateral agreements); *id.* at 30,166 (Rep. Leggett) (Act will "encourage international collaboration"); *id.* at 30,163 (Rep. Dingell) (Act will "encourage * * * foreign governments to develop healthy stocks of animals").

[34] See, *e.g.*, 124 Cong. Rec. 38,124 (1978) (Rep. Bowen) ("there are a number of projects in the country right now which are frozen and are at a standstill" due to Section 7); *id.* at 38,128 (Rep. Beville) (Section 7 "could actually paralyze the construction of needed projects in every district in this country"); *id.* at 21,132 (Senator Culver) ("there are now many other projects in the Nation where consultative resolution may not be possible under the exist-

The court of appeals relied (Pet. App. 16a-17a) on a statement in the Conference Report that the Senate version of the amendments, "by retaining existing law, was preferable [to the House version] since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). From this, the court inferred a "tacit approval" by Congress of the provision in the 1978 regulations that interpreted Section 7 as applying to projects in foreign countries. See note 4, *supra*. However, the Conference Committee was not focusing on the extraterritoriality question at all; it was simply considering whether to retain an overall procedural framework that was familiar to federal agencies and had been incorporated into regulations. Nor does the Report give any indication that the Conference Committee was aware of the administrative interpretation. Compare *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991); *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *TVA* v. *Hill*, 437 U.S. at 192. Thus, nothing in this excerpt from the Conference Report, or elsewhere in the legislative history, remotely expresses a clear intent to extend Section 7 overseas.

### C. The Presumption Against Extraterritorial Application Applies to Statutes That Constrain Federal Agencies

The court of appeals discounted the presumption against extraterritorial application of statutes because the ESA "is directed at the actions of federal agencies, and not at the actions of sovereign nations." Pet. App. 20a. But as this Court recently held, the mere fact that United States law imposes limitations on conduct by the Government does not mean that the law follows the Government abroad. *Verdugo-Urquidez*, *supra*. Moreover, the presumption

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ing arrangement"); *id.* at 38,665 (Rep. Murphy) (amendments provide "[a] procedure under which any project in the country can be considered for an exemption").

against extraterritoriality was applied in a directly analogous situation in *Foley Bros.*, *supra*, where the Court declined to apply to a foreign-aid project in another country a statutory provision regulating contracts "to which the United States is a party." 336 U.S. at 285.

Furthermore, the policies underlying the presumption are clearly implicated by legislation, such as Section 7, that restricts the activities of federal agencies. Applying Section 7, for example, to bar an agency of the United States from assisting a development project undertaken by a foreign government because that project is deemed to jeopardize species in the foreign country could easily result in "unintended clashes between our laws and those of other nations which could result in international discord." *Arabian American Oil Co.*, 111 S. Ct. at 1230. As several courts of appeals have pointed out, conditioning assistance to a foreign nation on compliance with our own environmental standards "directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior," and would likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own." *NRDC* v. *NRC*, 647 F.2d at 1356-1357; accord *United States* v. *Mitchell*, 553 F.2d at 1002 (different countries strike different balances between development and preservation, and the "traditional method of resolving such differences * * * is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially"); see also *Babcock & Wilcox*, 5 N.R.C. 1332, 1345 n.11 (1977). Moreover, there can be serious practical barriers to the ability of a United States agency even to gather the necessary information in a foreign country, as the Assistant Solicitor of Interior recognized in concluding that the requirement to designate critical habitat does not apply in foreign countries. See J.A. 179 (quoted at page 3, *supra*); see also J.A. 190; *Arabian American Oil Co.*, 111 S. Ct. at 1234 (noting that EEOC has no power to issue subpoenas for witnesses or documents outside the United States). For these reasons, the presumption

against extraterritorial application of statutes is fully applicable to environmental statutes such as ESA Section 7(a)(2).

A closely related concern is that conditioning the overseas activities of government agencies on compliance with domestic environmental standards raises a serious threat of interference with the conduct of this Nation's foreign policy. As the State Department pointed out in 1978, "the mechanics of complying with the [ESA] consultation procedure * * * would often be incompatible with the speed, confidentiality and flexibility which are prerequisites of effective diplomacy." J.A. 189. Congress is presumed not to legislate in a way that would risk interference with the Executive Branch's conduct of foreign affairs. *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch*, 372 U.S. at 19; *Benz*, 353 U.S. at 147; cf. *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. at 319-322.

Congress has been sensitive to possible conflicts with foreign policy when it has addressed international environmental issues. NEPA, for instance, directs agencies to "lend appropriate support" to international cooperative efforts to prevent a decline in the worldwide environment "where consistent with the foreign policy of the United States." 42 U.S.C. 4332(2)(F). Likewise, Section 8 of the ESA assures consistency with foreign policy by requiring consultation with the Secretary of State in the rendering of assistance to foreign governments. 16 U.S.C. 1537(b), (c) and (d). Section 7 of the ESA contains no similar provision to assure consistency with foreign policy.

At the same time, Congress *has* specifically—and distinctly—addressed the role of environmental policy in implementing the Nation's foreign aid program. Section 117 of the Foreign Assistance Act directs the President to require the responsible agencies to prepare an "environmental impact statement" for any project funded under that Act that significantly affects the environment of the "global commons outside the jurisdiction of any country" and to prepare a (presumably less comprehensive)

"environmental assessment" for any project significantly affecting the environment of any "foreign country," 22 U.S.C. 2151p(c). Of particular relevance here, Section 119 of the Foreign Assistance Act specifically addresses the subject of endangered species by authorizing the furnishing of financial aid to help other nations protect wildlife habitats, develop sanctuaries, and catalog species, 22 U.S.C. 2151q(b), and it directs the Administrator of AID to take various actions to protect endangered species and promote biological diversity, 22 U.S.C. 2151q(g). The Administrator of Aid, in turn, has adopted regulations to ensure that environmental concerns are taken into account (see 22 C.F.R. Pt. 216), and an environmental assessment of the Mahaweli Project was undertaken pursuant to these statutory and regulatory provisions. See page 22 and note 12, *supra*. Thus, Congress has demonstrated that when it desires to do so, it knows how to provide for application of United States law in environmental matters arising in foreign countries.

More recently, in 1988, Congress passed a joint resolution in which it: (1) recognized that habitat destruction is a main cause of the accelerating extinction of animal and plant species and that "increased international cooperation is essential to protect species threatened with extinction," (2) called upon the President "to continue exerting United States leadership in order to achieve the earliest possible negotiation of an international convention to conserve the Earth's biological diversity," and (3) supported AID's efforts to initiate discussions to that end. Pub. L. No. 100-530, 102 Stat. 2651. Congress thus has confirmed that the appropriate approach to the preservation of endangered and threatened species and their habitats in foreign countries is through diplomacy and international cooperation and agreements. Unilateral extension of the strict substantive and procedural provisions of Section 7 of the ESA to U.S.-assisted actions in foreign countries would undermine the flexibility of the President and AID in these efforts. It also could severely disadvantage the United States in the international community by requiring it to abstain from participation in

important projects where the strict requirements of Section 7 cannot be fully satisfied, and it might, as a consequence, lead to less environmental protection because of the loss of the leverage the United States enjoys through such participation.

### D. The Administrative Interpretation of Section 7 Is Entitled to Substantial Deference

Finally, the court of appeals plainly erred under *Chevron* by giving "no deference" (Pet. App. 15a) to what is, at the very least, a reasonable administrative interpretation of Section 7(a)(2). Even where, as here, an agency has changed its mind, "substantial deference is nonetheless appropriate if there appears to have been good reason for the change." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. at 355-356. Here, as in *Robertson*, the revision of the regulation came about "only after the prior regulation had been subjected to considerable criticism." 490 U.S. at 356; see also *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1769 (1991). For one thing, the initial position conflicted with the administrative interpretation of the closely related critical-habitat provision in the same sentence of Section 7(a)(2), which does *not* apply in foreign countries. Moreover, the preamble to the 1986 regulation explained that the 1978 amendments to the ESA highlighted the "domestic orientation of the consultation and exemption processes," 51 Fed. Reg. 19,929, and the comments of the Executive Departments having responsibility for the conduct of foreign affairs made manifest the potential for interference with the sovereignty of foreign nations that would result from extraterritorial application. See pages 4-5, *supra*. There was, in short, "good reason for the change." *Robertson*, 490 U.S. at 356.

The view of the Executive Departments responsible for conducting the activities of the United States Government abroad is itself entitled to deference on questions of extraterritoriality. See *Babcock & Wilcox*, 5 N.R.C. at 1344; cf. *McCulloch*, 372 U.S. at 20. The consistent view of those Departments on the question presented here has

now been adopted as well by the Secretaries of the Interior and Commerce. The court of appeals has cast that broad consensus aside and sought to force every department and agency of the Executive Branch to acquiesce in its far different vision of Section 7(a)(2)'s geographic reach. Accordingly, if the Court concludes that respondents have standing to challenge the administrative interpretation in the abstract setting of this case (contrary to our submission in Point I), it should reverse the judgment below on the merits.

## CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to enter judgment for the Secretary of the Interior on the ground that respondents lack standing to challenge the interpretative regulation. If the Court finds that respondents have standing, the judgment of the court of appeals should be reversed on the merits and the Secretary's interpretative regulation regarding the geographic scope of Section 7(a)(2) of the Endangered Species Act should be sustained.

Respectfully submitted.

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## APPENDIX

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 2 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531, provides:

### Congressional findings and declaration of purposes and policy

**(a) Findings**

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

**(b) Purposes**

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

**(c) Policy**

(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with

State and local agencies to resolve water resource issues in concert with conservation of endangered species.

2. Section 4 of the ESA, 16 U.S.C. 1533, provides in relevant part:

**Determination of endangered species and threatened species**

**(a) Generally**

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

**(b) Basis for determinations**

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat

and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

* * * * *

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose

citizens harvest the species on the high seas, and invite the comment of such nation thereon;

* * * * *

3. Section 7 of the ESA, 16 U.S.C. 1536, provides in relevant part:

**Interagency cooperation**

**(a) Federal agency actions and consultations**

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

**(e) Endangered Species Committee**

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

* * * * *

**(g) Application for exemption; report to Committee**

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such

agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

* * * * *

(2)(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

* * * * *

**(h) Grant of exemption**

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for any agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of the hearing

held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

* * * * *

4. Section 8 of the ESA, 16 U.S.C. 1537, provides:

**International cooperation**

**(a) Financial assistance**

As a demonstration of the commitment of the United States to the worldwide protection of endan-

gered species and threatened species, the President may, subject to the provisions of section 1306 of Title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

**(b) Encouragement of foreign programs**

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other pur-

poses to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

**(c) Personnel**

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

**(d) Investigations**

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

5. Section 9 of the ESA, 16 U.S.C. 1538, provides in relevant part:

**Prohibited acts**

**(a) Generally**

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section

1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

6. Section 11 of the ESA, 16 U.S.C. 1540, provides in relevant part:

* * * * *

**(g) Citizen suits**

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of

any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

* * * * *

7. 50 C.F.R. 402.01 provides in relevant part:

**Scope.**

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act").

* * * * *

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species

or results in the destruction or adverse modification of critical habitat.

8. 50 C.F.R. 402.02 provides in relevant part:

**Definitions.**

* * * * *

"*Action*" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

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